HENRY R. NASHOOKPUK
LENNIE LANE, JR.
HARRIET J. LANE

IBLA 75-391 Decided June 30, 1975

Appeals from separate decisions of the Alaska State Office, Bureau of Land Management, rejecting Native Allotment applications Nos. F-16930, F-17540 and F-17689.

Affirmed.

1. Alaska: Native Allotments

An Alaska Native Allotment application covering lands which have been withdrawn from all forms of appropriation must be rejected unless the applicant can demonstrate that he actually used and occupied the land for a period of five years prior to withdrawal.

APPEARANCES: William Rives, Esq., of Davis, Wright, Todd, Riese, and Jones, Seattle, Washington, for appellants.

OPINION BY ADMINISTRATIVE JUDGE FISHMAN

This is a consolidated appeal from separate decisions of the Alaska State Office, Bureau of Land Management, rejecting Native Allotment applications F-16930, F-17540, and F-17689, because appellants failed to demonstrate five years of use and occupancy prior to July 8, 1930, when the lands were withdrawn by Executive Order 5391 of that date. The Native Allotment Act of May 17, 1906, 34 Stat. 197, as amended by the Act of August 2, 1956, 70 Stat. 954, 43 U.S.C. §§ 270-1 through 270-3 (1970), authorizes the Secretary of the Interior in his discretion to allot up to 160 acres of "vacant, unappropriated and unreserved non-mineral land in Alaska" to a qualified Native. Executive Order 5391 withdrew approximately 10 square miles at the village of Point Hope "pending survey and segregation by the General Land Office * * * and they are hereby reserved and set aside

for the use of the Office of Education, * * * subject to any valid claims thereto, existing at the date of this order * * *." The final paragraph of the withdrawal provided that the order "shall continue in full force and effect unless and until revoked by the President or by act of Congress."

Appellants admit that the tracts applied for are within the area of withdrawal. However, they assert that the area covered by withdrawal far exceeded the village's educational needs and thus was beyond the President's authority under the Act of June 25, 1910, 43 U.S.C. § 141 (1970). They conclude that the withdrawal order was invalid from its inception for this reason alone. They further argue that the President is only authorized to make temporary withdrawals; this would limit the effect of the withdrawal only until such time as the land needed for educational purposes could be determined, surveyed and segregated. They point out that it was not until 1964 that 22.47 acres were identified for school purposes and imply that at least from 1964 they could initiate use and occupation for allotment purposes.

Even if the executive withdrawal exceeded the authority of the 1910 Act, it is only necessary to note that the inherent Presidential authority to make withdrawals was not negated by the Act. United States v. Midwest Oil Co., 236 U.S. 459 (1915). So long as the lands are embraced within the withdrawal and the withdrawal was not revoked by the President or by an Act of Congress, the lands covered thereby are excepted from subsequent disposals. United States v. Minnesota, 270 U.S. 181 (1926). We note that the Act of May 31, 1938, 25 U.S.C. § 497 (1970), authorizes the Secretary to withdraw tracts not to exceed 640 acres each for school purposes. That Act did not affect the lawfully promulgated withdrawal of 1930 and did not reduce the acreage covered by the Executive Order.

It is well established that withdrawn lands and lands closed to nonmineral entry are not open to appropriation under the Alaska Native Allotment Act, and that no rights may be initiated under the Allotment Act by occupation and use of lands not open to appropriation. United States v. Minnesota, supra; David Capjohn, 14 IBLA 330 (1974). An order of withdrawal will continue in full force and effect until modified or revoked in a manner consonant with law. Clinton D. Ray, 59 I.D. 466 (1947); Jackson Hole Irrigation Co., 48 L.D. 278 (1921). It is clear that Executive Order 5391 remained in effect from the date it was promulgated on July 8, 1930, until it was revoked by Act of Congress, i.e., section 19 of the Alaska Native Claims Settlement Act of December 18, 1971, 43 U.S.C. § 1618 (Supp. III, 1973).

[1] Each appellant herein was born subsequent to 1930. None can demonstrate initiation of use and occupancy prior to the withdrawal of 1930. Nor may any possible prior use by appellants'

ancestors be considered. Larry W. Dirks, Sr., 14 IBLA 401 (1974). An Alaska Native Allotment application covering lands which have been withdrawn from all forms of appropriation must be rejected unless the applicant can demonstrate that the actually used and occupied the land for a period of five years prior to withdrawal. Mary T. Akootchook, 17 IBLA 189 (1974); Christian G. Anderson, 16 IBLA 56 (1974).

Therefore, pursuant to the authority delegated by the Secretary of the Interior to the Board of Land Appeals, 43 CFR 4.1, the decisions below are affirmed.

Frederick Fishman
Administrative Judge

We concur:

Douglas E. Henriques
Administrative Judge

Anne Poindexter Lewis
Administrative Judge